APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID H. MOFFET, JR. and JOHN HURSTON,	:	
vs.	:	CIVIL ACTION NO. C80-153A
STONE MOUNTAIN MEMORIAL ASSOCATION; GEORGE M.D. (JOHN) HUNT, III: SUSAN W. ANTHONY; ZELL MILLER; DAVID B. POYTHRESS; W. MILTON FOLDS; JOHN W. LONG; T. STEPHEN JOHNSON; GEORGE J. WILLIS; EUGENE I. PETERSON; and "JOHN DOE"	:	

ORDER

This action, in which Plaintiffs allege that Defendants deprived them of property rights in their employment without due process of law, is before the court for resolution following trial by the court without a jury on December 12, 1980. This order shall serve as the court's findings of fact and conclusions of law, Rule 52(a), Fed. R.Civ.P.

The parties have stipulated to the following:

The Stone Mountain Memorial Association was created by the Georgia General Assembly in 1958 as a body corporate and public and an instrumentality and public corporation of the State which in its name may contract and be contracted with, sue and be sued implead and be impleaded, and complain and defend in all courts of law and equity.

Pursuant to the authority delegated to it by the Georgia General Assembly, the Stone Mountain Memorial Association, on August 22, 1966, through the adoption of personnel policies and procedures recommended by the Yarger Report, adopted a merit system ("1966 Merit System") for Stone Mountain employees to be effective September 1, 1966.

The personnel policies and procedures of the 1966 Merit System provided, inter alia, at page III-25, as follows: "These policies and procedures may be amended by Association resolution." The personnel policies and procedures have been amended and changed from time to time. As of

February 2, 1976, certain provisions of the personnel policies and procedures of the Defendant Stone Mountain Memorial Association provided, inter alia, as follows:

"6.0 EMPLOYMENT

6.2 Probationary Period: All new employees will be hired for a probationary period of 90 days, during which time he may be separated by the department head, subject to the approval of the General Manager, without cause. Further, at the completion of 90 days' employment, all employees will be given an evaluation by the immediate supervisor. All evaluations will be treated as confidential and will be retained by the Personnel Manger. (See Paragraphs 8.0 below.)

6.3 Status: All personnel will be classified in one of three categories. Full-time Permanent; Part-Time Permanent; and Part-time. Following is an explanation of each status:

a. Full-time permanent is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.

b. Part-time Permanent is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours

year around or a minimum of 1,440 hours per year.

c. Part-time is an employee, hired on a temporary status who works seasonably or does not normally work a scheduled work week of 28 hours of more year around. Part-time employees are not allowed any fringe benefits. (They are, however, covered by Workmen's Compensation.)

13.0 SEPARATIONS

13.1 General: Unless otherwise provided in this policy, the tenure of a permanent employee shall be during good behavior and satisfactory performance of duties as recorded by his performance evaluations.

13.5 Dismissals: The supervisor or department head, upon notice to an employee stating specific reasons therefor, may dismiss any employee for cause as herein defined. For purpose [sic] of this section, 'cause' for dismissal shall be negligence or inefficiency in performing the duties of the position held, unfitness to perform assigned duties, misconduct, failure to cooperate or insubordination. Such employee may appeal to the General Manager within ten days after the effective date of dismissal and if the General Manager exonerates such employee from the charges on which

> his dismissal is based, such employee may be reinstated to the position from which he was convicted by a court of record of any crime involving moral turpitude when such conviction is final, shall have no course to appeal."

The personnel policies and procedures were further changed by resolution of the Defendants Stone Mountain Memorial Association at its September 11, 1978, meeting deleting the language as appeared in "6.2 Probationary Period" with no replacement, and changing "6.3 Status" to 5.3 Status" and also changing section 13. The changed sections provide, inter alia, as follows:

> "5.3 Status: All personnel will be classified in one of three categories: Full-time; Part-time; and Temporary. Following is an explanation of each status:
>
> a. Full-time is an employee who normally works a regular scheduled work week of 40 hours or more, year around or a minimum of 1960 hours per year.
>
> b. Part-time is an employee who normally works a scheduled work week of 28 hours or more, but less than 40 hours when averaged over a one year period with a minimum of 1,440 hours per year.

c. Temporary is an employee, hired on a temporary basis who works seasonally or does not normally work a scheduled work week of 28 hours or more year around. Temporary employees are not allowed any fringe benefits.

13.0 SEPARATION AND ADVERSE ACTIONS

13.1 General: All employees serve at the discretion of the General Manager or his designee.

13.3 Adverse Actions: The supervisor or department head, may dismiss, demote, suspend, reduce the salary of or otherwise discipline any employee under his supervision. Upon written request within ten days of the effecitve date of the adverse action, the employee may meet the General Manager or his designee regarding the adverse action."

The above-quoted sections are the language that existed from September 11, 1978 to present.

On October 19, 1979, defendant Peterson requested the resignation of Plaintiff Moffet, advising him if it was not given, Moffet's employment would be terminated. Moffet met that day with Defendant Willis, who agreed at that time to

give Moffet thirty days to correct any deficiencies as related to him. On October 23, 1979, Moffet and Hurston were fired with the only written reason given being that it was in the best interest of the Park.

On October 23, 1979, the attorney for Plaintiff Moffet by letter demanded that Moffet be reinstated to his position, and by letter to Defendant Miller, with a copy to all members of the Association, requested that Moffet be reinstated. The letter and copies were received.

On October 26, 1979, Plaintiff Hurston, through his attorney and by letter to Defendant Hunt, with a copy to all members of the Association, requested that he be reinstated and if he not be reinstated that he be granted a hearing. The letter and copies were received.

On October 25, 1979, Defendant Willis instructed Plaintiffs' attorney that all communications regarding Plaintiff Moffet be directed to Michael J. Bowers, Senior Assistant Attorney

General. On October 29, 1979, defendant Hunt, Chairman of the Stone Mountain Memorial Association, made a similar request. The Letter was received.

On October 31, 1979, by letter to Michael J. Bowers, Senior Assistant Attorney General, Fletcher Thompson, as attorney for Plaintiffs Moffet and Hurston, requested a hearing before the Stone Mountain Memorial Association for his clients. The letter was received.

The Stone Mountain Memorial Association and George M.D. (John) Hunt, III, Susan W. Anthony, Zell Miller, David B.Poythress, W. Milton Folds, John W. Long, and T. Stephen Johnson had it within their power to reinstate Plaintiffs to their jobs or to require a hearing for Plaintiffs concerning their discharge and refused to reinstate or give a hearing. Moffet and Hurston were not reinstated and have been given no hearing wherein they could answer charges. Any hearing Georgie Willis could have provided would have been before himself or subordinates.

Plaintiff Moffet attended the aforesaid September 11, 1978 meeting of the Defendant Stone Mountain Memorial Association for the purpose of giving a report, and was present during the consideration and adoption by the Association of the changed personnel policies and procedures.

Plaintiff Moffet received the Stone Mountain Memorial Association memorandum dated September 18, 1978 advising department managers of the Defendant Stone Mountain Memorial Association of the changes effective September 18, 1978 in the personnel policies and procedures.

Both Plaintiff Moffet and Plaintiff Hurston attended the February 7, 1979 meeting of supervisory employees of the Defendant Stone Mountain Memorial Association.

Prior to the termination of their employment with the Defendant Stone Mountain Memorial Association, neither Plaintiff Moffet nor Plaintiff Hurston voiced any objection to any Defendants in this action concerning the change of the personnel

policies and procedures effective September 18, 1978.

The employment of the Plaintiffs Moffet and Hurston by the Defendant Stone Mountain Memorial Association on October 23, 1979 was terminated by Defendant Peterson as the designee of the General Manager of the Association.

Defendant Willis was at all times relevant to this action the General Manager of the Stone Mountain Memorial Association, and Defendant Peterson was at all such times the Senior Assistant General Manager of the Defendant Association.

The Plaintiffs at the time of the termination of their employment received no written reason, other than as in section 8 above, stating why they were discharged and all Employee Performance Evaluations of Plaintiffs up to the time of discharge were satisfactory or better.

At the time of the termination of his employment, Plaintiff Moffet received $4,444.00 from the Defendant Stone Mountain Memorial Asso-

ciation. This amount consisted of the following: Pay earned October 13-23, 1979 - $565.60; accrued annual leave - $2,020.00; pay October 24-26, 1979 $242.40; and unearned pay--four weeks--$1,616.00

At the time of the termination of his employment, Plaintiff Hurston's salary from the Defendant Stone Mountain Memorial Association was $684.00 per two weeks. The Association was paying into Hurston's retirement fund $139.27 per month and $68.32 per month was paid by the Association for Hurston's hospital and medical benefits.

At the time of the termination of his employment, Plaintiff Hurston received $2,975.40 from the Defendant Stone Mountain Memorial Associaition. This amount consisted of the following: Pay earned October 13-23, 1979 - $478.80; accrued annual leave - $923.40; pay October 24-26, 1979 $205.20; unearned pay - four weeks-$1,368.00.

On December 19, 1979, the Defendants through their counsel furnished the Plaintiffs through their counsel detailed written reasons why Plain-

tiff Moffet were terminated; no hearing was held thereafter.

The parties stipulate to the accuracy of the following facts but not to their relevancy: If called to testify, Margaret A. House would testify under oath as follows: I am currently the custodian of the files and records of the DeKalb County Water Quality Control Laboratory and Monitoring Branch of the Water and Sewer Department. During all of 1978 and 1979 I was also the custodian of said files and records. From my review, I have determined that the only letter or written communication other than routine analytical reports on monthly samples sent to the Stone Mountain Memorial Association or any of its employees, officers, agents or representatives, from the DeKalb County Water and Sewer Department concerning wastewater samples or sewage discharge from the Association's water treatment plant is set forth in Exhbiit "A" to the parties' "Stipulation of Facts" filed October 24, 1980. More-

over, from my personal recollection, this is the only such letter or written communication.

(END OF STIPULATED FACTS)

In order for a public employee to be entitled to procedural due process in connection with termination of his employment, the employee must demonstrate that he has either a liberty or a propery interest in his employment. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Plaintiffs here seek to vindicate only their claimed property right in their employment. "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 577. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and

that support claims of entitlement to those benefits." Id at 577.

The parties agree that the court must decide whether plaintiffs were possessed of a property interest in their employment by consulting Georgia Law. Neither the court nor the parties have located any Georgia authority on point, however. Defendants rely heavily upon Fulton County v. Spratlin, 210 Ga. 447 (1954), to support their position. That case only tangentially relates to the issue before the court, however. Plaintiffs, on the other hand, advance various cases from other jurisdiction on the scope of the word "amend", also minimally persuasive.

The court is convinced that they key issue in this case is whether the Stone Mountain Memorial Association had the legal right to alter its personnel policies and procedures to change the tenure of permanent employees from during "good behavior and satisfactory performance" as shown by their written evaluations to serving "at the

discretion of the Genral Manager." Plaintiffs argue that, prior to the September 11, 1978 changes in the personnel policies, they had a property interest in their employment and that they could not be deprived of those property rights either by amendment of the policies or by discharge without a hearing.

Defendants contend, however, that the personnel policies and procedures, as originally enacted, provide that "[T]hese policies and procedures may be amended by Association resolution," and that this reservation expressly provided the authority to change the personnel policies in September 1978.

The heart of this issue lies in the meaning to be attached to the word "amended". Defendants argue that the Association's actions in revising the personnel policies amounted to no more than an amendment of them that was expressly authorized within the policies. Plaintiffs contend vigorously in opposition that amendment contemplates

some change less radical than the Association's actions in September 1978, which Plaintiffs argue constituted a repeal of critical portions of the personnel policy and thus a deprivation of property rights in their employment. Thus, if the term "amended" is given a narrow scope and if its meaning is restricted to some level of change less than the Association's action in September 1978, Plaintiffs may indeed have had property rights in their employment that they could not have been deprived of absent due process. If, on the other hand, "amended" is broad enough to include the Association's revision in September 1978 of the personnel policies, the Association retained a "string" when it instituted the merit system that was paramount to the employees' rights. Instead, any rights they had were contingent on the Association not "amending" them away.

The court is particularly troubled by the prospect of adjudicating this dispute, involving as it does a matter of great importance to the

parties, on an ephemeral and hypertechnical linguistic analysis. Since, as noted above, any property interest Plaintiffs may have in their employment must exist under Georgia Law, the court has conducted careful research to locate some Georgia authority on point, but has found none. However, after thoughtful consideration and in reliance upon the general principles of the law relating to relations between masters and servants that are ingrained in the law in Georgia, the court is left with the firm conviction that the Association's reservation in its personnel policy of the power to amend those policies precluded the existence of a property interest entitled to due process protection.

A general hiring, or employment for no fixed period, creates an employment relationship that is terminable by either party. See Ga. Code Ann. §66-101. Absent a controlling contract, even "permanent employment" or "employment for life" is employment for a indefinite period, terminable

at will. E.g., Georgia Power Co. v. Busbin, 242 Ga. 612, 613 (1978). Thus, under Georgia law, a clear and unambiguous contract must exist in order to alter this status quo of employment at will.

The Association was not required to institute any merit personnel policies in 1966. The legal relations created by those personnel policies thus stem from and are limited by the language of the policies themselves, as the evidence of the Association's intention. The testimony by Association members at trial supports the court's conclusion that the Association intended to reserve the power to change the personnel policies as it did in 1978, and the language used in the policies to reserve that power was effecitve to do so. Accordingly, despite Plaintiffs' unilateral expectation that the Association conveyed upon them an employment relation that amounted to property entitled to due process protection, the Association's reservation of the power to amend the terms of the

employment relation defeated the created of any such property.

Based upon the foregoing, the court DIRECTS the clerk to enter judgment in favor of Defendants.

SO ORDERED, this 28th day of April, 1981.

/s/ Newell Edenfield
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID H. MOFFET, JR. and JOHN HURSTON,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION FILE C80-153A
STONE MOUNTAIN MEMORIAL ASSOCIATION, et al.,	:	
Defendants.	:	

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable NEWELL EDENFIELD, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is ordered and Adjudged that the Plaintiffs take nothing, that the action be dismissed, and that Defendants STONE MOUNTAIN MEMORIAL ASSOCIATION, GEORGE M.D. (JOHN) HUNT, III, SUSAN W. ANTHONY, ZELL MILLER, DAVID B. POYTHRESS, W. MILTON FOLDS, JOHN W. LONG, T. STEPHEN JOHNSON,

GEORGE J. WILLIS, EUGENE I. PETERSON, and "JOHN DOE" have and recover of Plaintiffs DAVID H. MOFFET, JR. and JOHN HURSTON their costs of action.

Dated at Atlanta, Georgia this 29th day of April, 1981.

Filed and entered in Clerk's office
April 29, 1981
Ben H. Carter, Clerk

by /s/ A. Burns
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7432

D.C. Docket No. C-80-153A

DO NOT PUBLISH

DAVID H. MOFFET, JR. and
JOHN HURSTON,

Plaintiffs-Appellants,

versus

STONE MOUNTAIN MEMORIAL ASSOCIATION,
et al.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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(March 16, 1982)

Before TUTTLE, TJOFLAT, and CLARK, Circuit Judges

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs are taxed against Plaintiffs-Appellants."

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-7432

DAVID H. MOFFET, JR.,
and JOHN HURSTON,,

Plaintiffs-Appellants,

versus

STONE MOUNTAIN MEMORIAL
ASSOCIATION, et al.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

(Opinion March 16, 1982, 11 Cir.,198_,_F..2d___).
(April 21, 1982)

Before TUTTLE, TJOFLAT and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Cirucit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
UNITED STATES CIRCUIT JUDGE